DNR-86-012-BC
2-2000-551-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

David H Kaldahl, Five Lake (56-357-P),
Otter Tail County, Building of an Unauthorized Excavated Channel and Removal of Unauthorized Fill Below the Ordinary High Water Mark of Five Lake.

ORDER ON MOTION FOR SUMMARY DISPOSITION AND ORDER OF CERTIFICATION.

By written Moti on received by the Office of Administrative Hearings on July 28, 1986, David Kaldahl seeks an order of the Administrative Law Judge dismissing the above-captioned matter. It is asserted that the Commissioner of Natural Resources lacks regulatory jurisdiction over Five Lake since the water, it is contended, is not public waters subject to his jurisdiction.

Appearances: A.W. Clapp III, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department of Natural Resources (Department or DNR); and Richard C. Hefte, Rufer & Hefte, Attorneys at Law, 110 North Hill Street, P.O. Box 866, Fergus Falls, Minnesota 56537-0866, appeared on behalf of David H. Kaldahl (Mr. Kaldahl or Respondent).

At the request of the Administrative Law Judge, the parties submitted Stipulations of Fact which were supplemented by Affidavits of Counsel. The record for purposes of this Motion includes the Statement of Facts filed by David Kaldahl on July 28, 1986, the additional Statement of Facts submitted by the Office of the Attorney General, dated July 30, 1986, an Affidavit of Counsel dated September 29, 1986, submitted by the Attorney General's office and an Affidavit of Counsel dated September 30, 1986, submitted on behalf of Kaldahl. At the request of the Administrative Law Judge each party submitted an initial and reply brief.

The record closed on October 2, 1986, with the receipt of the final Affidavit of Counsel.

Based on the Stipulations of Fact, as supplemented, and on all the files and records herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Five Lake is located in Section 5 of Hobart Township in Otter Tail County. It is one of a group of small lakes lying in the north end of that

county. It is a glacially-formed meandered lake with a maximum length of about one mile and a maximum width of about one-half a mile.

2. In the spring of 1948, the Lake had about 228 acres of surface water area and, at the time of the instant proceeding, its surface area included substantially in excess of 80 acres of water.

3. Respondent David Kaldahl is the principal stockholder and officer of Fair Hills, Inc. The corporation purchased all of the land surrounding Five Lake from William M. Bollenbach on an unspecified past date.

4. Mr. Kaldahl operates a substantial resort on Five Lake and his corporation is the sole riparian landowner. There is no public access to Five Lake. The lake has no outlet or inlet.

5. In 1954, the Minnesota State Supreme Court determined that Five Lake was not public waters of the State of Minnesota for purposes of the Commissioner acquiring by condemnation an easement over private property for public ingress to and egress from Five Lake pursuant to Minn Stat. 1949, 97.48, subd. 15. State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954). The Court's conclusion was based on the fact that the lake was not navigable in fact at the time of the admission of the State to the United States under the federal test of navigability. Although a separate section of the statutes contained a broader definition of public waters for purposes of defining the jurisdiction of the Commissioner over waters, the Court did not reference that section.

6. Five Lake has been given a shoreland management classification by the Commissioner pursuant to Minn. Stat. 105.485 (1984). Five Lake was also included in the Commissioner's List of Public Waters in Otter Tail County which was presented to the Otter Tail County Board and subsequently published with notice of opportunity to petition for a hearing on April 17, 1980, as required by Minn. Stat. 105.391, subd. 1 (1980). No petition to exclude Five Lake from the Commissioner's List of Public Waters was submitted.

7. Five Lake has been meandered and, at all time material hereto, had not been legally drained.

8. In October and November of 1984, David Kaldahl dug a channel across a peninsula on Five Lake. He did so without first obtaining a permit from the Commissioner.

9. In November of 1984, Department of Natural Resources Enforcement-Officer Norman E. Floden cited Mr. Kaldahl by a DNR ticket for a violation of 0LQQ 6WDW 105.42 (1984). The DNR officer was acting pursuant to the authority granted by Minn. Stat. 97.50, subd. 1 (1984), which authorizes an

Enforcement Officer of the Department of Natural Resources to arrest for violations of Minn. Stat. Ch. 105 and to issue a summons in lieu of arrest. Pursuant to Minn. Stat. 105.541 (1984), a violation of Minn. Stat. 105.42
(1984), is a misdemeanor.

10. The criminal violation was tried before the District Court in Otter Tail County on stipulated facts. The case was tried as an offense against the
State of Minnesota by the County Attorney of Otter Tail County. Except for

the issuance of the initial citation, neither the Commissioner, nor the Department participated in the prosecution either directly or indirectly.

11. By written Findings of Fact, Conclusions of Law and Order, dated August 14, 1985, the Honorable Elliot 0. Boe, Judge of the District Court, dismissed the Complaint. The basis for his decision was the determination that Five Lake was not "public waters" of the State of Minnesota subject to the statutory permit jurisdiction of the Commissioner. The Court placed principal reliance on State v. Bollenbach, supra, for the conclusion that Five Lake is a private body of water.

12. -le State appealed the decision of the District Court to the Minnesota Court of Appeals. The Court of Appeals held that any appeal regarding the dismissal of the complaint, including a redetermination of the status of Five Lake as public waters of the State would be prohibited by constitutional considerations of double-jeopardy. State v. Kaldahl, 381 N.W.2d 502 (Minn. App. 1986). The Court did not consider the merits of the trial court's determination that Five Lake was private water, noting that even "erroneous interpretations of governing legal principles . . ." would necessitate dismissal of the appeal because of considerations of double-jeopardy. State v. Kaldahl, 381 N.W.2d 502, 503.

13. The Commissioner, thereafter, issued'a Restoration Order, pursuant to Minn. Stat. 105.462 (1984), requiring Mr. Kaldahl to fill the channel created through the peninsula in Five Lake. The Commissioner has authority to issue such a restoration order and to require a permit for channeling only if the Lake is public waters of the State, as defined in Minn, Stat. sec. 105.37, subd. 14 (1984).

14. The statutory definition of public waters, in effect at the time material hereto, included:

> (a) All water basins assigned a shoreland management classification by the commissioner pursuant to Section 105.485, except wetlands less than 80 acres in size which are classified as natural environment lakes;
>
> (c) All meandered lakes, except for those which have been legally drained . . .
>
> The public character of waters shall not be determined exclusively by the proprietorship of the underlying, overlying, or surrounding land or by whether it is a body or stream of water which was navigable in fact or susceptible of being used as a highway for commerce at the time this state was admitted to the union.

15. Pursuant to Minn. Stat. 105.462 (1984), the Respondent requested a contested case hearing on the Restoration Order and the jurisdiction of the Commissioner to regulate Five Lake.

Based upon the f oregoing Findings of Fact and in reliance on the .applicable statutory and decisional law, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Five Lake in Otter Tail County was at all times material hereto and remains public waters of the State, within the meaning of Minn. Stat. 105.37, subd. 14 (1984).

2. State v. Bollenbach, supra, does not preclude the Commissioner from exercising regulatory control over Five Lake.

3. A. determination herein that Five Lake is public waters of the State is not prohibited by constitutional principles of double-jeopardy, res judicata, or collateral estoppel.

4. As a consequence of Conclusions 1 - 3, supra, the Commissioner has jurisdiction to regulate construction in or alteration of the Lake and to require a permit for such activity. Minn. Stat. 105.42 (1984).

5. Although the regulatory authority of the Commissioner over public waters is subject to "existing rights", there has been no showing that requiring a permit for channeling activity in Five Lake would so substantially deprive David Kaldahl of the use and enjoyment of his property as to prevent application of the permit regulations to him. Moreover, that issue is not otherwise ripe for determination herein since there has been no showing that, upon proper application and with appropriate safeguards, a permit would not be issued.

6. Any Finding of Fact more properly considered a Conclusion, or any Conclusion more properly considered a Finding of Fact is hereby expressly adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

The Motion of the Respondent for summary disposition of the above-captioned proceedings due to a lack of jurisdiction in the Commissioner to regulate channeling in Five Lake is DENIED.

Pursuant to Minnesota Rules 1400.7600 (1985). the decision of the Administrative Law Judge on the Motion-is--certified to the Commissioner.

Dated this
day of October, 1986.

BRUCE D. CAMPBELL
Administrative Law Judge

MEMORANDUM

Respondent resists the jurisdiction of the Commissioner by the instant Motion on the ground that the non-public character of Five Lake has been determined in Bollenbach, supra, and State v. Kaldahl , supra, It is asserted that principles of double-jeopardy, res judicata and collateral estoppel prohibit any redetermination of the issue. For the reasons hereinafter discussed, the Administrative Law judge determines that it is appropriate, in this restoration proceeding, to reconsider the authority of the Commissioner to regulate Five Lake and that it constitutes public waters of the State as defined in Minn. Stat. 105.37, subd. 14 (1984). As such, activity in the Lake is subject to the permit Jurisdiction of the Commissioner.

The Respondent, initially, argues that constitutional principles of double-jeopardy prohibit the instant enforcement proceeding. It is asserted that the dismissal of the criminal complaint prohibits the Commissioner from proceeding under the same statute to remedy the same conduct. In Matter of Estate of Congdon, 309 N.W.2d 261, 270-71 (Minn. 1981), the Court clearly rejected the argument that an acquittal in a criminal proceeding necessarily prohibits the bringing of a civil action based on the same conduct. See State v. Enebak, 272 N.W.2d 27, 30 (Minn. 1978). The rule is as stated by the Nebraska Supreme Court in Neil v. Peterson,.314 N.W.2d 275, 276 (1982):

> Acquittal on a criminal charge is not a bar to a civil action by the government, remedial in nature, arising out of !.he same -facts on which the criminal proceeding was based.
>
> Helverinq v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938); Atkinson v. Parsekian, 37 N.J. 143, 179 A.2d 732 (1962)

The prohibition against double-jeopardy might, legitimately, be asserted if the purpose of the second action, after acquittal, were considered punitive. The instant Restoration Order, however, is not punitive, but merely remedial. The distinction was recently considered by the United States Supreme Court in United States v. One Assortment of 89 Firearms, 104 S.Ct.

1099 (1984), in which it held that a civil proceeding for the forfeiture of firearms after an acquittal on criminal charges involving the firearms was not prohibited by principles of double-jeopardy. The Supreme Court determined that the forfeiture of the firearms involved a civil, remedial measure and not a second attempt to punish criminally for the same infraction. In v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938), the Court held that the imposition of a civil sanction in the form of a monetary penalty for a violation of the tax code was not a second attempt at criminal punishment after acquittal, but an authorized remedial civil sanction. In Murphy v. United States 372 U.S. 630, 47 S.Ct. 218 (1926), the Court held that an acquittal on a criminal charge of maintaining a nuisance did not prohibit a suit in equuty ic enjoin the nuisance. The Court found the second action to be a civil remedial measure not prohibited by principles of double jeopardy.

The Respondent does not suggest facts that would lead to a conclusion that the Restoration Order herein is a second attempt to punish him criminally for the same conduct. From the facts hereinbefore discussed it is clear that the action of the Commissioner is not punitive but is a civil, remedial measure

designed to restore the status quo ante. As such, it is well within the ,decisions of the United States Supreme Court previously enumerated which authorize such subsequent civil, remedial measures. The Administrative Law Judge therefore rejects the argument by the Respondent that the Restoration Order is prohibited by principles of double-jeopardy.

The Respondent also argues that the doctrines of res judicata, stare decisis and collateral estoppel prohibit a determination in this proceeding that Five Lake is public waters subject to the jurisdiction of the Commissioner. The Respondent relies on his acquittal in the criminal proceeding upon the previous decision of the State Supreme Court in Bollenbach supra, and the decision of the Court of Appeals in his criminal appeal. the doctrines relied upon by Respondent, though logically distinct, have a common basis, the concept that matters finally determined between parties or their privities should not be thereafter redetermined. For the reasons hereinafter discussed, the Administrative Law Judge determines that the doctrines do not prohibit the redetermination in a civil proceeding of a matter litigated in a criminal acquittal, even if the civil proceeding is brought by the same sovereign. That result follows from the different burdens of proof applicable in each proceeding and the protections afforded a criminal defendant which are not available in a civil proceeding.

In Coffey v. United States, 116 U.S. 436; 6 S.Ct. 437, 29 L.Ed. 681 (1886). the United States Supreme Court initially held that a forfeiture action brought against distilling equipment was barred by the owner's prior acquittal on charges of removing and concealing distilled spirits with intent to defraud the revenue department. The Coffey Court did not articulate the precise legal basis for its holding.

Subsequent decisions, previously discussed, have limited Coffey, supra, to its facts. In Murphy v. United State;, supra, the Court held that a suit in equity to enjoin a nuisance was not precluded by an acquittal of the building owner on a criminal charge for the same conduct. The Court held, on the basis

of the difference in the burden of proof, that res judicata had no application. 'Similarly, in Helvering v. Mitchell, supra, the Court held that an action by the Commissioner of Internal Revenue to recover a substantial monetary penalty for fraudulent avoidance of income tax was not barred by a previous criminal acquittal on the charge. The Court announced the rule that an acquittal on a criminal charge is not a bar to a civil action by the government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based. It rejected application of the doctrine of res judicata on the basis of the difference in the burden of proof. Mitchell, 303 U.S. at 397-398, 58 S.Ct. at 632 (citations omitted). Finally, in United States v. One Assortment of 89 Firearms, supra, the Court limited Coffey, supra, to its facts and determined that a forfeiture proceeding was not prohibited by an acquittal on a criminal charge involving the same conduct.- The Court relied on a difference in the burden of proof for establishing-the- rule and rejected application of the doctrines of collateral estoppel and res

The Minnesota State Supreme Court has recognized that the difference in the burden of proof in a civil proceeding, as compared to a criminal proceeding, is a reason not to apply res judicata and collateral estoppel to the second civil proceeding. Matter of Estate of Congdon, 309 N.W.2d 261, 270 (Minn. 1981).

A number of I ower fe der a I courts have determined t hat a civi 1 acti on based on the same conduct involved in a criminal acquittal is not prohibited by application of the doctrines of res judicata or collateral estoppel, even when the same sovereign is concerned. in United States v. Warner Brothers Pictures, 13 F.Supp. 614 (E.D.Mo. 1936), the Court held that an acquittal on a criminal charge of conspiracy to violate the Sherman Act was not a bar to a subsequent civil suit for an injunction to restrain execution of the same conspiracy. The Court specifically rejected any application of the doctrine of res in the civil proceeding. Similarly, in United States v. United States Gypsum Co., 51 F.Supp. 613 (D.C.D.C. 1943), the Court held that a directed verdict in a prosecution under the Sherman Act for conspiracy to monopolize trade in gypsum products was not res judicata as to the right of the government to bring an action in equity to enjoin such alleged monopolistic practices. The Court relied upon the difference in the respective burdens of proof and the protections afforded a defendant in a criminal proceeding.

Following the rule announced in the federal caselaw, a number of state courts have also held that a civil, remedial action based on the same conduct is not barred by a previous criminal acquittal, even in cases involving the same sovereign. Neither res judicata, nor collateral estoppel prevents the bringing of the second remedial action. Blackmon v. Richmond County, 224 Ga. 387, 162 S.E.2d 436 (1968); City of Girard v. Girard Egg Corp., 87 ILL.App.2nd 74, 230 N.E.2d 294 (1967); Adams v. State Department of Health, 458 So.2d 1295 (La. 1984); Natick v. Scstilio , 358 Mass. 342, 264 N.E.2d 664 (1970); State ex rel Douglas v. Morrow, 216 Neb. 317, 343 N.W.2d 903 (1984); Atkinson v. parsekian, 37 N.J. 143, 179 A.2d 732 (1962); Borough of Saddle River v. Bobinski, 108 N.J. Super 6, 259 A.2d 727 (1969).

Based on the foregoing authority, the Administrative Law Judge concludes that where a civil, remedial action is brought.to remedy the same conduct that was involved in a prior criminal acquittal, the doctrines of res judicata and collateral estoppel do not apply, even if the remedial proceeding and the criminal charge were brought by the same sovereign.

In Matter of Estate of Congdon supra, however, the Minnesota Court did cite with approval decisions in other jurisdictions which rely on Coffey, supra. The Administrative Law Judge believes that the Court would no longer do so in light of the limitation of that case to its facts by the United States Supreme Court, as previously discussed. If Coffey, supra, does, however, retain some vitality, the Administrative Law Judge finds that a consideration of the specific criteria for application of the doctrines of

collateral estoppel and res judicata would not preclude the Administrative Law Judge from reexamining the status of Five Lake as public waters of the State.

In Willems v. Commissioner of Public Safety, 333 N.W.2d 619, 621 (Minn. 1983), the court held that the application of collateral estoppel is appropriate where: (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party-was given a full and fair opportunity to be heard on the adjudicated issue. Similar considerations given application of the doctrine of res judicata. United States v. Warner Bros. Pictures, supra.

The Adaministrative Law Judge f inds that s ever al condi ti on s for the appl ic ation of the doctrine of col I atera I estoppe I are not present in the instant case. Initially, the State was unable to secure review in the Court of Appeals of the status of Five Lake as public waters of the State due to principles of double-jeopardy. This, alone, would prevent the Commissioner from having a full and fair opportunity to be heard on the adjudicated issue. in Natick v. Sostilio, 358 Mass. 342, 264 N.E.2d 664, 666 (1970), the Court specifically relied on the inability of the state to perfect a criminal appeal as grounds for not finding collateral estoppel:

> Another distinction worth noting is that in a criminal case the Commonwealth would have no right of appeal from an acquittal of a defendant involving an alleged zoning violation, even though the acquittal might have been based on an erroneous interpretation of the law. The town should not be bound by such a prior proceeding.

Further, the Administrative Law Judge finds that the party here seeking to be estopped, the Commissioner of Natural Resources, was not a party or in privity with a party to the prior criminal proceeding. In State Department of Public Safety v. House, 192 N.W.2d 93 (Minn. 1971), the Court held that the Commissioner of Public Safety was not estopped by a plea bargain made by the county.attorney in a criminal proceeding acting on behalf of the State. The Court distinguished between the State as the prosecuting authority, represented by the county attorney, and the Commissioner of Public Safety who possessed independent statutory responsibility. The Court also relied on the fact that the Commissioner of Public Safety was represented by the Attorney General and not the county attorney. Similarly, in State of Minnesota, City of Burnsville v. Juarez, 345 N.W.2d 801 (Minn.App. 1984), the Court held that, in a criminal proceeding brought by the City of Burnsville on behalf of the State of Minnesota for driving while intoxicated, collateral estoppel did not prohibit the relitigation of an issue decided adversely to the Commissioner of Public Safety in a civil proceeding under the implied consent statute. The Court held that the State of Minnesota, City of Burnsville, is not the same

party as the Commissioner of Public Safety. The Court further found that, on the facts of the case, privity did not exist so as to apply the doctrine of collateral estoppel. The Court looked to the absence of participation in the prior proceeding, the ability to control that proceeding and the absence of representation of the party to be estopped in the prior proceeding.

Based upon both House, supra, and Juarez, supra, the Administrative Law Judge finds that the Commissioner is not prohibited from relitigating the status of Five Lake as public waters by the previous criminal proceeding. As in both House, supra, and Juarez, supra, the Commissioner is exercising an independent statutory authority and is not identified with the prosecuting authority, the State, represented by the county attorney.

Nor do the facts adduced establish privity as discussed in Juarez, supra. There is no evidence in the record that the Commissioner controlled or had a right to control the criminal prosecution. Moreover, the State was represented by-the county attorney and not the Attorney General, who represents the Commissioner. There is no evidence in the record that any participation by the Commissioner occurred or was statutorily authorized, except the issuance of the initial complaint.

Although Kaldahl argues in his Affidavit of Counsel that the county attorney was representing the Commissioner in prose cut ing the crimina I action, that conclusion is clearly erroneous and reflects a misunderstanding by the county attorney of his role. There is nothing either in statutory law or in the documents filed with the trial court to indicate that any party other than the State of Minnesota was the authority seeking the criminal prosecution. By statutory definition, the conduct here at issue, under the criminal charge, was a criminal misdemeanor. under such circumstances, that is an offense against the State in its sovereign capacity and not against an individual government official.

The Administrative Law Judge can find no support in either the statutes and decisional law or the trial court documents substantiating the Affidavit of Counsel filed by Kaldahl. The Commissioner of Natural Resources is a party clearly distinct from the State of Minnesota as represented by the county attorney in the criminal action. Under such circumstances, the doctrine of collateral estoppel and res judicata have no application. House, supra; Juarez, supra.

Nor does the doctrine of stare decisis require the Administrative Law Judge to find that Five Lake is not public waters of the State. For the reasons hereinafter discussed, Bollenbach, supra, does not require that result in light of the statutory definition of public waters in effect in 1984. Minn. Stat. 105.37, subd. 14 (1984). Nor does the decision in State v. Kaldahl, supra, authoritatively establish the private character of Five Lake. The determination of the trial court was clearly erroneous, as hereinafter discussed. The Court of Appeals did not adopt the trial court's conclusion that Five Lake was private, but merely held that a reconsideration of the question was prohibited by principles of double-jeopardy. Hence, the doctrine of stare decisis does not require the Administrative Law Judge to find Five Lake to be private waters not subject to the permit jurisdiction of the Commission.

It could be argued that, although the criminal prosecution does not bar the administrative remedy the Commissioner now attempts to impose, Bollenbach, supra, authoritatively establishes that Five Lake is not public waters of the State, subject to the jurisdiction of the Commissioner. Bollenbach, supra, was decided on the issue of whether the public had a right to hunt and fish on Five Lake, as the phrase "hunt and fish" was used in Minn. Stat. 97.48, subd. 15 (1954), as affecting the State's authority to establish public access on lakes. State v. Bollenbach, 241 Minn. 103, 118, 63 N.W.2d 278 (1954). The case was not concerned with the definition of public waters as that term is used in Minn. Stat. Ch. 105, as affecting the regulatory jurisdiction of the Commissioner over water. It is clear that the Commissioner may have authority to regulate a body of water by requiring a permit even if title to the underlying lake bed is privately owned. Herschman v. State Department of Natural Resources, 225 N.W.2d 841 (Minn. 1975).

The Administrative Law Judge need not,-therefore, decide Whether Bollenbach, supra, remains the law on the issue it decided. See, Johnson v. Seifert 257 Minn. 159, 168, 100 N.W.2d 689, 696 (1960). It is sufficient to conclude that Bollenbach, supra. does not address the authority of the Commissioner to regulate activity on Five Lake by permit under Minn. Stat. Ch. 105.

Even assuming that Five Lake was not public water as statutorily defined for purposes of Minn. Stat. Ch. 105 at the time of the decision in Bollenbach, supra, that determination would not be controlling in 1984, if the current test of public waters is met. In Pratt v. State Department of Natural Resources, 309 N.W.2d 767 (Minn. 1981), the Court held that a change in the statutory definition to subject a body of water to the control of the Commissioner is not prohibited and the Commissioner then may exercise regulatory jurisdiction over waters previously outside of the requirements of Minn. Stat. Ch. 105.

It is clear that Five Lake, in 1984 when the channel was dug and at the present time, meets the test of public waters as that term is defined in Minn. Stat. 105.37, subd. 14 (1984). It exceeds 80 acres in size and has had a shoreland management classification at all times relevant hereto. It is meandered and has not been legally drained. Further, it is included in the Commissioner's List of Public Waters in Otter Tail County and no petition for reconsideration of its status was filed. Under such circumstances, the Administrative Law Judge finds that Bollenbach, supra, does not prohibit a determination that Five Lake is public waters of the State.

The control of the State over public waters and, derivatively, the regulatory authority of the Commissioner is,-however, subject to existing rights, Minn. Stat. 105.38 (1984). That statutory provision relates to existing riparian rights of the shoreowners. Pratt, supra . Such rights do not prevent the Commissioner from exercising permit jurisdiction, absent a taking of a property interest by the government. Pratt, supra; Application of Central Baptist Theological Seminary, 370 N.W.2d 642 (Minn.App. 1985).

Although the Respondent has not raised in this proceeding an issue of taking or confiscation, it could be argued that the Commissioner may not apply regulations to Five Lake without compensation to the Respondent. In Pratt v Department of Natural Resources, supra, the Court held that it may be inappropriate to apply a regulation to what has been redefined as public waters due to the economic impact of the regulation on the property. The Administrative Law Judge has, however, concluded that Bollenbach. supra, did not determine the status of Five Lake under Minn. Stat. Ch. 105, a variant of

which was in existence at the time of the decision so as to pose the situation of a statutory redefinition of public waters. Moreover, even if the Administrative Law Judge were to determine that such an argument is assertable by Kaldahl, the issue is not ripe for determination in this proceeding. Since. Kaldahl has not even applied for a permit, conjecture about its denial is entirely speculative. Nor is there evidence of the particular and peculiar economic hardship here as demonstrated in Pratt, supra.

Hence, the Administrative Law Judge determines that Five Lake clearly is public waters of the State of Minnesota within Minn. Stat. 105.37, subd. 14 (1984), and, as such, it is subject to the permit jurisdiction of the Commissioner. No previous decision or theory of law prevents the Administrative Law Judge from making that determination and applying it to Mr. Kaldahl in this proceeding.

Due to the fact that the issue involves the regulatory jurisdiction of the Commissioner under Minn. Stat. Ch. 105 and is disputed, the Administrative Law Judge certifies his decision herein to the Commissioner. Any further filings by the part i es with the Commissi oner wi 1 1 be as directed by him or his representative.

B. D.C.